INDEX

	Page
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT	1
DECISION TO BE REVIEWED	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-5
ARGUMENT	6-11
CONCLUSION	12
CERTIFICATE OF SERVICE	13

INDEX TO APPENDIX

		Page
1.	OPINION OF COURT OF APPEALS	1-9
2.	ORDER DENYING THE RE-HEARING	10
3.	FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT FILED SEPTEMBER 23, 1971	11-14
4.	ORDER OF TRIAL COURT DATED OCTOBER 18, 1971	15-16

AUTHORITIES

Cases	Page
Clay v. Sun Insurance Office, Ltd., 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229	10, 12
Continental Casualty Co. v. Westinghouse Electric Supply, 403 F.2d 761 (5th Cir. 1968)	10
Erie Railroad Co. v. Tomkins, 304 U.S. 64, 58 S.Ct. 817, 28 L.Ed. 118	10
Kenney v. Trinidad Corp., 349 F.2d 832, 839 (5th Cir. 1965)	10, 11
Klaxon Co. v. Stenton Electric Manufacturing Company, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477	10
W. F. Thompson Construction Co. v. Southeastern Palm Beach County Hospital District, 174 So.2d 410 (Fla. App. 1965)	9
Sun Insurance Office, Ltd. vs. Clay, 133 So.2d 735, 738 (Fla. 1961)	10
Wood & Selich v. Compagnie Generale, 43 F.2d 941 (2 Cir., 1930)	7, 12

CONSTITUTIONAL, STATUTORY & RULE PROVISIONS

Florida Statute, §95.03 (1969)	3, 5, 9
Florida Statute, §95.11, 5(e)	3
Mexican Federal Labor Law, Title 10, §517	3
Rule 19, 1(h) Supreme Court Rules	2
28 USC §1254(1)	2

In the Supreme Court of the United States

OCTOBER TERM, 1972

CASE NO. _____

NEIL W. GILLIES,

Petitioner,

vs.

AERONAVES DE MEXICO, S.A.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District

---

Petitioner, NEIL W. GILLIES, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered August 28, 1972, in Case No. 71-3464.

DECISION TO BE REVIEWED

The Opinion of the Court of Appeals, not yet reported (A. 1-9), reverses the Findings of Fact and Conclusions of Law of the United States District Court of the Southern District of Florida, Case No. 70-1842-Civ-PF (A. 11-14), which were in favor of the petitioner in said cause.

JURISDICTION

The judgment of the Court of Appeals of the Fifth Circuit was entered on August 28, 1972. A timely petition for rehearing en banc was denied on October 4, 1972, and this Petition for Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is envoked under 28 USC §1254(1) and Rule 19, 1(h), Supreme Court Rules.

QUESTIONS PRESENTED

I.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND THEREFORE CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA, LAW WHICH BARRED PETITIONER'S CLAIM?

II.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA?

STATUTORY PROVISIONS INVOLVED

Florida Statutes, §95.03 (1969):

"All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Florida Statutes, §95.11, 5(e):

"Actions other than those for the recovery of real property can only be commenced as follows:

* * *

(5) Within three years.—

* * *

(e) And an action upon a contract, obligation or liability not founded upon an instrument of writing * * *."

Mexican Federal Labor Law, Title 10, §517:

"Actions of workers who are dismissed from work shall lapse in two months."

STATEMENT OF THE CASE

Petitioner, NEIL W. GILLIES, a citizen of the United States residing in Miami, Florida, brought an action against the respondent, AERONAVES DE MEXICO, S.A., an air flagline of the Republic of Mexico, seeking to recover damages claimed to be due petitioner under the provisions of the Mexican Federal Labor Law based upon the discharge of the plaintiff from the defendant's employ without cause. Petitioner claimed that he fully and properly performed services for the respondent as a navigator during the term of his employment and that his employment was based upon an unwritten contract with the respondent for an indefinite term and that this contract incorporated the benefits of the Mexican Federal Labor Law.

Petitioner further claimed that his contract with the respondent was terminated and he was separated without cause and was, therefore, entitled to the benefits contained in the Mexican Labor Law.

The respondent raised the main defense that petitioner's claim was barred by the lapsing provisions of the Mexican Labor Law.

The case was tried before the District Court without a jury, and upon the evidence presented, the trial court found for the petitioner, and in so doing determined that the petitioner's cause of action arose in the State of Florida; that the plaintiff was terminated without justifiable cause; and that the plaintiff was entitled to the benefits of the Mexican Labor Law. The trial court further found

that the issue of limitations was procedural and not substantive, and that the Florida statute applied rather than the lapsing provisions of the Mexican Labor Law (A. 14).

Thereafter the respondent entered its appeal to the United States Court of Appeals for the Fifth Circuit, which rendered an Opinion and Order dated August 28, 1972 (A. 1-9), holding the lapsing provisions of the Mexican Federal Labor Law to be substantive and applicable to the petitioner's claim, under an exception to the general rule that the law of the forum controls procedural matters. The appellate court thereupon held that the District Court was in error in not applying the limitations of the Mexican law to the petitioner's claim, and the judgment of the trial court was reversed.

The appellate court apparently neglected to consider the public policy of Florida and its application to the petitioner's claim as set forth in Florida Statute §95.03 (1969). Thereafter, a Petition for Rehearing and Suggestion for Hearing En Banc were filed by the petitioner, which were denied by Order of the Court of Appeals for the Fifth Circuit dated October 4, 1972 (A. 10).

The initial action was brought by the petitioner in the Circuit Court of the Eleventh Judicial Circuit of Florida, but was removed by petition of the respondent to the United States District Court, Southern District of Florida, on the basis of a diversity of citizenship between the respective parties.

ARGUMENT

I.

THE APPEALS COURT ERRED IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND, THEREFORE, CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA, LAW.

The decision of the Court of Appeals wholly misconstrues the lapsing provisions of the Mexican Federal Labor Law by holding that Florida courts would characterize the lapsing provisions as exceptions to the general rule, and therefore substantive rather than procedural. This conclusion is reached by the appellate court holding that the petitioner's right is created by the Mexican law, the period of limitations is contained in the law, and the lapsing period, or limitation, is specifically applicable to the petitioner's situation.

The petitioner's cause of action was based on breach of contract. The claim sought to be enforced is not a statutorily created one, although the contract embodies the terms and benefits of the statute. However, had there been no contract, there would have been no cause of action.

The appellate court found that Florida generally follows the traditional rule that a statute of limitations is procedural for the purposes of choice of law requiring

the lex fori to be applied. Florida also recognizes the exception to this general rule when an entirely new right of action is created by statute, and that same statute provides a limitation of time for the enforcement thereof.

Clearly, the appellate court overlooked the fact that the petitioner's claim was founded upon a contract, the action to enforce it was based upon contract and therefore not controlled by those cases, involving the exception to the well-established rule, applying the law of a foreign jurisdiction, other than the place of making the contract, rather than the law of the forum where the litigation is being undertaken.

The appellate court, in arriving at the conclusion set forth in its Opinion, considered a number of cases which were completely inapposite to a contract action of the type here involved. The Opinion completely overlooks the test enunciated in the case of *Wood & Selich v. Compagnie Generale*, 43 F.2d 941 (2 Cir. 1930), which, it is contended, is the case that Florida would follow in construing the Mexican Federal Labor Law lapsing provisions. Moreover, it appears that the appellate court overlooked certain other facts pertaining to the petitioner's contract. It was established that the contract was entered into in Florida; the petitioner was based in Florida; paid in Florida; and discharged in Florida. The respondent was engaged in doing business in Florida and, in fact, the only connection between the respondent and the Republic of Mexico is that the respondent, Aeronaves de Mexico, is a flag airline of that country. Therefore, the interest of the State of Florida in the contract and its interpretation would appear to outweigh the interest of the Republic of Mexico.

In fact, it would appear that since this is a contract action, and not statutory; since expert testimony which was uncontradicted, established that the Mexican lapsing provisions bar but do not extinguish one's contract rights; and since Florida has the greater interest in the application of its law in this case, it must logically be concluded that Florida would follow the general conflicts-of-law ruling and construe the Mexican lapsing provisions as procedural and not applicable.

The Mexican Federal Labor Law has been in existence for over 20 years for the sole purpose of benefiting the worker and not the employer, and is so constructed as to construe every doubt, ambiguity and question concerning the law in favor of the worker and against the employer.

Clearly, the conclusion of the appellate court that Florida would consider the claim of the petitioner to be an exception to the general rule for enforcement of contracts was without realistic support in the evidence or the law and therefore erroneous.

II.

THE APPEALS COURT ERRED IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA.

The appellate court apparently failed to realize that its opinion was diametrically opposed to public policy of the State of Florida as expressed by statute. Florida Statute §95.03 (1969) states:

> "All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

This statute has been interpreted and upheld by the following decisions:

> *W. F. Thompson Construction Co. v. Southeastern Palm Beach County Hospital District*, 174 So.2d 410 (Fla.App. 1965).

Continental Casualty Co. v. Westinghouse Electric Supply, 403 F.2d 761 (5th Cir. 1968).

Attention is called to the fact that in this diversity action, conflicts of laws, rules and public policy of Florida controls. *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 28 L.Ed. 118; *Klaxon Co. v. Stenton Electric Manufacturing Company*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477.

In fact, this Florida statute has been interpreted by the Supreme Court of Florida as applying to

> "[a]ny contract whatever—foreign or domestic —when Florida's contact therewith, existing at the time of execution or occurring thereafter, is sufficient to give a court of this State jurisdiction of a suit thereon." *(Sun Insurance Office, Ltd. v. Clay*, 133 So.2d 735, 738 (Fla. 1961).)

It should also be noted that the constitutionality of this Florida statute along with the interpretation given it by the State of Florida were upheld by the United States Supreme Court in *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229.

In discussing the State-interest of Mexico while neglecting to consider the public policy of Florida, the appellate court quoted, on page 8 of its Opinion, from the case of *Kenney v. Trinidad Corp.*, 349 F.2d 832, 839 (5th Cir. 1965), the following:

> "The state that creates the cause of action has an obvious interest in determining how long it can be enforced, but the forum has relatively little to set against the interest of the foreign state. There is something to be said for applying

> the prescriptive period of the forum if it is shorter than the foreign period: the courts of the forum should not be forced to decide stale claims merely because the foreign state has a longer period of limitation. But the forum has no particular interest in applying a longer period of limitation."

However, the appellate court apparently overlooked the first sentence of the next paragraph following the quote, which states:

> "[i]n applying conflict rules, courts reserve the right to enforce a strong foreign law *if it is contrary to a strong public policy of the forum.*" (Emphasis added)
>
> *Kenney v. Trinidad, supra,* 839.

As the appellate court pointed out in its Opinion on page 3, the plaintiff "[h]ad all of his contracts with Aeronaves in Miami, where he was hired, based, paid and fired."

Thus, it would appear that the lex loci contractus was in Florida, and that Florida's law would apply concerning the remedy for the wrongful discharge of the petitioner. However, both parties contracted that the Mexican Federal Labor Law would apply. For that reason the remedies provided in the Mexican Federal Labor law must apply in the present case; however, in light of Florida's strong public policy prohibiting the application of any provision in any contract which would fix a period of time less than that provided by Florida's Statute of Limitations, the Mexican lapsing provisions, even if construed as substantive, could not be enforced in Florida. To attempt to do so is strictly against Florida's public policy and void.

CONCLUSION

The appellate court, in failing to apply the principals set forth in *Wood & Selich v. Campagnie Generale, supra*, and likewise the appellate court in ignoring the public policy of the State of Florida which has been recognized by the Court in *Clay v. Sun Insur. Office, Ltd., supra*, has rendered a decision in conflict with a decision of the Supreme Court and another Court of Appeals, and has decided an important state question in a way which conflicts with applicable state law which calls for an exercise of this Court's power of supervision, and a writ of certiorari should therefore issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

JOHN W. PRUNTY
and
GUION T. DeLOACH
Counsel for Petitioner
837 City National Bank Building
Miami, Florida 33130

by_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth District was mailed this _____ day of December, 1972, to SHUTTS & BOWEN, Attorneys for Respondent, 1000 First National Bank Building, Miami, Florida 33131.

JOHN W. PRUNTY

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3464

NEIL W. GILLIES,

Plaintiff-Appellee,

versus

AERONAVES DE MEXICO, S.A.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(August 28, 1972)

Before TUTTLE, MORGAN and RONEY, Circuit Judges.

RONEY, Circuit Judge: Neil W. Gillies brought this action against Aeronaves de Mexico, S.A., the Mexican national airline, seeking to recover damages allegedly due him under the provisions of the Mexican Federal Labor Law because of his wrongful discharge from employment with the airline. He recovered $47,666.66 in damages. The district court concluded that the Florida State of Limitations was controlling, not the limitation period in the Mexican Law which would have barred the suit. We held that the Mexican Law should apply, that the suit was not timely brought, and that the judgment should be reversed.

THE FACTS

Gillies is a citizen of the United States residing in Miami, Florida. He was originally employed in 1959 as a navigator for Aerovias Guest Airlines flying from Miami to Bermuda and Europe. He continued in the employ of this airline until its merger with Aeronaves. On March 1, 1963, Aeronaves employed Gillies as a navigator on the Miami to Madrid run. This employment arrangement was evidenced by a memorandum in writing dated March 5, 1963, and was for a one year period commencing on March 1, 1963, and ending on the last day of February, 1964.

Upon the expiration of the first year of employment Gillies continued as navigator on the same flight run until his employment was terminated by Aeronaves on June 30, 1968. The termination was found by the trial court to be without justifiable cause. From the end of February, 1964, until the termination the parties did not enter into a written contract nor was there in existence any written memorandum evidencing the employment conditions.

Since Gillies was a United States citizen, Aeronaves secured Mexican work permits for him in compliance with Mexican law. These were usually for a year or six months and were renewed from time to time as required. At the time Gillies was discharged he was covered by a Mexican work permit which had not expired.

Gillies had all his contacts with Aeronaves in Miami where he was hired, based, paid, and fired. Aeronaves had a facility in Miami and was licensed by Florida to conduct business there.

We agree that the district court had jurisdiction of the parties and the subject matter of this cause.

THE MEXICAN FEDERAL LABOR LAW

The Mexican Federal Labor Law provides certain benefits for employees who are unjustly terminated from their jobs. Although in dispute, it can be assumed for the purpose of this decision that the district court correctly held that plaintiff's employment was terminated without justifiable cause within the meaning of the Mexican Law. In such case, to be exempt from the obligation of reinstating the employee, the employer must pay the following compensation under Article 125 of the 1931 Law:

> Article 125.—The compensations mentioned in the foregoing Article shall consist of:
>
> I. Three months' wages.
>
> II. If the work relation should be for a specific period of time not exceeding one year: a sum equal to the wages payable for one-half the period that services were rendered. If exceeding one year: a sum equal to six months' wages for the first year and equivalent to twenty days' wages for each following year during which services were rendered.
>
> If the work relation was for an indefinite period, the indemnity shall consist of twenty days' wages for each year's service.
>
> III. The amount of the unearned wages for the period elapsing from the date of dismissal until the indemnities mentioned in the two foregoing Sections have been paid.

No indemnity had been paid to plaintiff, and the district court held that he was entitled to unearned wages to the date of judgment under provision III.

This Law provided that the rights granted thereunder "shall lapse in one month" and that "the term for lapsing shall run from the moment of discharge." In 1970 a new law was substituted which provides that such actions "shall lapse in two months" and that "lapsing shall commence to run from the day following the date of dismissal." Although there is some dispute as to which law should be used to decide the substantive question, the matter is of no concern to the limitations argument. Under the one law plaintiff had until July 30, 1968, and under the other until August 30, 1968. Under either statute his suit filed on November 25, 1970, would be barred.

THE ISSUE

The trial court decided that the suit was not barred by the Florida Statute of Limitations, a point disputed but unnecessary for us to resolve. It held that the Florida law applied and not the Mexican law because the limitations and lapsing provisions "are procedural provisions of the Mexican Federal Labor Law and cannot be applied by this Court." This appeal squarely raises the question of whether the law of the forum, Florida, or the law by which the contract is to be governed, Mexico, is to supply the controlling statute of limitations.

THE DECISION

Since this is a diversity case, the issue is to be decided as if it were being determined in a Florida court applying the Florida conflict of laws rule. Klaxon Co. v. Stentor

Electric Mfg. Co., 313 U.S. 487 (1941). Florida follows the general rule of conflicts in contract actions. The construction of the contract and the legal rights flowing therefrom are controlled by the lex loci contractus, meaning either the law of the place where the contract was made, or the law by which the contract is to be governed if the cause of action arises under the laws of a foreign jurisdiction other than the place of the making of the contract. Hagen v. Viney, 169 So. 391 (Fla. 1936). The law of the forum where the litigation is taking place, the lex fori, governs in procedural matters. Ferris & Co. v. William Schluderberg, T. J. Kurdle Co., 193 So. 429 (Fla. 1940).

It is agreed that Mexican law controls the substantive rights and liabilities of the parties. The question then is whether the Mexican limitations period is substantive or procedural. If it is procedural, the district court was correct in not applying it. If it is substantive, then plaintiff's claim is barred. Again, whether the provision is procedural or substantive must be determined by Florida law. *Fahs v. Martin*, 224 F.2d 387 (5th Cir. 1955).

Generally, Florida follows the traditional rule that a statute of limitations is procedural for the purposes of choice of law requiring the lex fori to be applied. Van Deren v. Lory, 100 So. 794 (Fla. 1924). However, Florida has long recognized an exception to this general rule. When an entirely new right of action is created by statute, and the same statute provides the limitation of time within which the action must brought, then

> "[s]uch a limitation of time is not like the ordinary statute of limitation affecting merely the

> remedy, but it enters into and becomes a part of the right of action itself, and if allowed to lapse without the institution of the action, such right of action becomes extinguished and is gone forever." Fowler v. Mathney, 184 So.2d 676, 677 (Fla. App. 1966).

See La Floridienne, J. Buttgenbach Co. v. Seaboard Air Line Ry., 52 So. 298 (Fla. 1910); Bowery v. Babbit, 128 So. 801 (Fla. 1930). This exception is well established in American jurisprudence:

> "There is one well-settled exception to the general rule that forum law governs statutes of limitation. When a statute which creates a right specifies that the existence of its new creation shall continue only for a limited length of time, there is no existent right beyond what the statute has created, and no other state, even though its statute would allow a longer period for such suits, will entertain an action on a right which has ceased to exist." Leflar, American Conflicts Law, §127, at page 305 (Rev. Ed. 1968).

In an early Supreme Court case, the rationale for this principle was succinctly stated by Justice Holmes:

> "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act,

> it follows that the law determines, not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." Slater v. Mexican National Railroad Co., 194 U.S. 120, 126 (1904).

In a Fifth Circuit case, when refusing to apply a Louisiana Workmen's Compensation Law without applying the Louisiana limitation period, Judge Sibley considered the limitation period as a condition of the right, stating:

> "While ordinarily the limitations of the forum are applied as pertaining merely to the remedy, there is an exception where the cause of action is created by a foreign statute which also fixes a limitation for its assertion. The limitation is then considered to be a condition of the right, so that no recovery is allowed where recovery would be barred by the law which gives the right." Ford, Bacon & Davis v. Volentine, 64 F.2d 800, 802 (5th Cir. 1933).

Judge Wisdom later expressed the principle in terms of state interest in Kenney v. Trinidad Corp., 349 F.2d 832, 839 (5th Cir. 1965):

> "The state that creates the cause of action has an obvious interest in determining how long it can be enforced, but the forum has relatively little to set against the interest of the foreign state.

> There is something to be said for applying the prescriptive period of the forum if it is shorter than the foreign period: the courts of the forum should not be forced to decide stale claims merely because the foreign state has a longer period of limitation. But the forum has no particular interest in applying a longer period of limitation."

The lapsing provisions could have been "interrupted" if, within the lapsing period, Gillies had filed a claim against Aeronaves with the Mexican administrative board set up by the Law to handle employer-employee disputes of this genre. It could also have been "interrupted" if the defendant had recognized verbally, in writing or by unquestionable acts, the right of Gillies. Neither of these events took place. There is no provision for a revival of the right once it has lapsed. The import of the Law is that it is the right which lapses, and not the remedy.

The impact of liability created by the statute is a matter of Mexican interest. It is entirely proper that Mexican law should control the extent of that impact. The very words of the law speak in terms of the lapsing of a right, and not in terms of a bar to its enforcement.

Regardless of which rationale is used, we think that the Florida courts would hold that the lapsing provision of the Mexican Labor Law is substantive and should be applied under the exception to the general rule. The employee's right is created by the Law, the period of limitations is contained in the Law, and the lapsing period is specifically made applicable to employees in Gillies' situation.

The justice of this conclusion is all the more evident because of the continuing liability and increasing amount of damages that accrue under the Law through the delay in payment of the claim. The Law gives a right to wages "from the date of dismissal up to the date the indemnities are paid." The importance of a speedy resolution of any claim is readily apparent. The delay of two years in bringing the claim resulted in a considerably larger judgment against defendant than Gillies could have obtained if he had brought the suit within the period required and it had been promptly determined and paid. Thus the very nature of the Law causes the lapsing period to have a direct effect upon the amount of the liability. With such a substantive effect on the amount of the claim, the argument that the lapsing provisions are only procedural loses all force.

The Mexican limitation period should have been applied. Under it Gillies' claim had lapsed. The district court should have denied recovery.

REVERSED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3464

NEIL W. GILLIES,
Plaintiff-Appellee,

versus

AERONAVES DE MEXICO, S.A.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Aug. 28, 1972, 5 Cir., 1972, ____ F.2d ____).

(October 4, 1972)

Before TUTTLE, MORGAN and RONEY, Circuit Judges.

PER CURIAM: The argument in the petition for rehearing in reference to the Mexican Labor Law and the clearly erroneous doctrine of Rule 52(a) apparently overlooks Rule 44.1, Federal Rules of Civil Procedure. The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 70-1842-Civ-PF

NEIL W. GILLIES,

Plaintiff,

vs.

AERONAVES DE MEXICO, S.A.,
a Mexican corporation,

Defendant.

[Filed September 23, 1971]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on for trial before the Court without a jury, at which the parties appeared together with their respective counsel.

Based upon stipulations of the parties and upon the evidence adduced at trial, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court has jurisdiction of this cause and of the parties by reason of diversity of citizenship and claims in excess of the sum of Ten Thousand Dollars ($10,000.00). At all times relevant hereto, Plaintiff is a resident of Dade County, Florida, and the Defendant is a corporation organized and existing under the laws of the Republic of Mexico, with its principal place of business located in Mexico City.

2. Defendant is the national air carrier of Mexico operating as such throughout Mexico and internationally between Mexico and foreign countries, including the United States. Its administrative, executive and accounting offices and its maintenance and overhaul facilities are all located in Mexico.

3. Defendant maintains business offices and airport facilities in Dade County, Florida, and employs a number of employees at such offices.

4. The Plaintiff was employed by the Defendant in Miami, Florida, as a flight navigator for a period commencing on March 1, 1963, and ending on June 30, 1968. During plaintiff's employment by the Defendant, Plaintiff fully and properly performed his services and was compensated therefor as agreed.

5. The Plaintiff's employment in Miami, Florida, was pursuant to an oral agreement which, by implication, incorporated substantive provisions of the Mexican Federal Labor Law. In fact, the testimony indicated the Plaintiff would not have accepted employment without the benefits of the Mexican Federal Labor Law.

6. The Plaintiff was based in Miami, Florida, and performed as a flight navigator on round-trip flights between Miami, Florida, and Madrid, Spain. In 1966, the Plaintiff in connection with his navigation duties performed certain flight training of navigators for the Defendant while on these round-trip flights. Plaintiff received his pay in Miami, Florida, and was granted expenses for time spent away from his home base.

7. The Plaintiff's employment was terminated by the Defendant as of June 30, 1968, in Miami, Florida, without justifiable cause.

8. The Plaintiff's period of employment extending from March 1, 1963, to June 30, 1968, entitled him to the indemnities and benefits of the Mexican Federal Labor Law. The Plaintiff's termination was accomplished in Miami, Florida.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court makes the following conclusions of law:

1. The Court has jurisdiction of the parties and of the subject matter of this cause.

2. Plaintiff's cause of action arose in Florida and he is entitled to bring this suit.

3. Plaintiff's termination was without justifiable cause.

4. Plaintiff, as an employee of the Defendant, is entitled to the indemnities and benefits of the Mexican Federal Labor Law.

5. The statute of limitations of the State of Florida is applicable. The limitations or lapsing provisions as well as the provisions for boards of conciliation and arbitration are procedural provisions of the Mexican Federal Labor Law and cannot be applied by this Court.

6. Plaintiff is entitled to recover a judgment against the Defendant in the amount of $47,666.66.

WHEREFORE, judgment shall be entered for the Plaintiff and against the Defendant in the amount above specified, and an Order shall be entered accordingly.

/s/ Peter T. Fay

U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 70-1842-Civ-PF

NEIL W. GILLIES,

Plaintiff,

vs.

AERONAVES DE MEXICO, S.A.,
a Mexican corporation,

Defendant.

ORDER

THIS MATTER came before the Court upon the defendant, AERONAVES DE MEXICO, S.A.'s Motion for New Trial and to Amend and Alter Findings of Fact and Conclusions of Law and Final Judgment.

The Court has reviewed the motion and supporting memorandum. The Court considered all of the points raised by the defendant prior to the entry of judgment and finds them without merit.

However, upon reviewing the Findings of Fact and Conclusions, the Court noticed that it failed to state the specific section of the Florida Statute of Limitations which is applicable to this cause. The Court, therefore, will amend

its Findings of Fact and Conclusions of Law to specifically state the subsection which is applicable. It is, therefore—

ORDERED AND ADJUDGED that the defendant's Motion for New Trial and to Amend and Alter Findings of Fact and Conclusions is hereby denied, and it is

FURTHER ORDERED AND ADJUDGED that paragraph 5 of the Conclusions of Law in the Findings of Fact and Conclusions of Law entered by this Court on September 22, 1971, is hereby amended to read as follows:

> "5. The statute of limitations of the State of Florida is applicable, specifically Section 95.11 (5) (a), Florida statutes. The limitation or lapsing provisions as well as the provisions for boards of conciliation and arbitration are procedural provisions of the Mexican Federal Labor Law and cannot be applied by this Court."

DONE AND ORDERED at Miami, Florida this 18th day of October, 1971.

/s/ Peter T. Fay

UNITED STATES
DISTRICT JUDGE

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	5
FIRST QUESTION	5
SECOND QUESTION	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES:

Bournias v. Atlantic Maritime Co., Ltd., 220 F.2d 152 (CA 1955) 1, 5, 6, 8

Bowery v. Babbit, 99 Fla. 1151, 128 So. 801 (1930) .. 9, 10

Davis v. Mills, 194 U.S. 451, 24 S. Ct. 692, 48 L. Ed. 1067 ..... 6, 10, 11

Ford, Bacon & Davis v. Volentine, 64 F.2d 800 (5th Cir. 1933) 12

Fowler v. Matheny, 184 So.2d 676, 677 (Fla. 4th Dist. 1966) 9

Gaston v. B. F. Walker, Inc., 400 F.2d 617 (5th Cir. 1968) 11

Harrisburg, The, 119 U.S. 199, 7 S. Ct. 140, 30 L.Ed. 358 (1886) 9, 10, 11

Kenney v. Trinidad Corp., 349 F.2d 832 (5th Cir. 1965) 11

Page

Kozen v. Comstock, 270 F.2d 839 (5th Cir. 1959) ... 12

La Floridienne, J. Buttgenbach Co. v. Seaboard Airline Ry., 59 Fla. 196, 52 So. 298 (1910) 9

Moragne v. States Marine Lines, 398 U.S. 375 (1970) 10

Ramsay v. Boeing Co., 432 F.2d 597 (5th Cir. 1970) 11

Stern v. La Compagnie Generale Transatlantique, 110 Fed. 996 9

Thompson v. Hoxsie, 25 R.I. 377, 55 Atl. 930 9

Union Fish Co. v. Erickson, 1919, 248 U.S. 308, 39 S. Ct. 112, 63 L. Ed. 261 14

Wood & Selick v. Compagnie Generale Transatlantique, 43 F.2d 941 (CA 2nd, 1930) 1, 5

STATUTORY PROVISIONS:

Fla. Stat. §95.03 .....2, 13

The Mexican Federal Labor Law 2, 4, 5, 7, 14

Article 328 ..... 3, 8

Article 329 .....3, 8, 12

Article 123 ..... 3, 8

Article 125 3

Panama Labor Code, Article 623 7

19 Am. & Eng. Ency. Law, p. 151 10

OTHER AUTHORITIES:

RESTATEMENT OF CONFLICT OF LAWS §397 6

COOK, SUBSTANCE AND PROCEDURE IN THE CONFLICT OF LAWS, 42 Yale L. J. 333, 337 (1933) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Case No.....

NEIL W. GILLIES,

Petitioner,

-vs-

AERONAVES DE MEXICO, S.A.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Certiorari jurisdiction has not been invoked.

Petitioner contends the decision sought to be reviewed herein is in conflict with *Wood & Selick v. Compagne Generale Transatlantique*, 43 F. 2d 941 (CA 2nd, 1930), a Second Circuit case decided in 1930. Pretermitting the soundness of his contention, petitioner has failed to inform the Court that the cited case is no longer followed by the Second Circuit[1] and, consequently, is not a jurisdictional predicate for review.

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[1]*In Bournias v. Atlantic Maritime Co., Ltd.*, 220 F. 2d 152 (CA 1955), the Second Circuit considered and rejected the *Wood* test for determining whether a foreign statute of limitation was substantive or procedural.

Petitioner also contends that the decision sought to be reviewed herein, which holds that the lapsing provisions of the Mexican Labor Law are substantive and therefore conclusive of the petitioner's claim for benefits thereunder, is contrary to the public policy of the State of Florida. This contention appears to rest on the fallacious premise that a Florida statute,[2] which voids any contract fixing a shorter period of limitation for its enforcement than is provided by the applicable Florida statute of limitation, can somehow invalidate substantive lapsing provisions contained in the controlling Mexican Labor Law. Obviously, such a premise can not invoke the certiorari jurisdiction of this court.

QUESTIONS PRESENTED

I.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND THEREFORE CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA, LAW WHICH BARRED PETITIONER'S CLAIM?

II.

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE

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[2]Florida Statute 95.03.

AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA?

STATUTORY PROVISIONS INVOLVED

THE MEXICAN FEDERAL LABOR LAW

Article 328. *Rights to recourse which may arise from this Law* or from the collective or individual labor contract shall lapse in *one year, except in the cases covered by the following Articles.*

Article 329. The following shall lapse in *one month:*

* * *

III. Rights granted to workers by Section XXII of Article 123...

Section XXII. An employer who dismisses a worker without justifiable cause . . . shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages . . .

Article 125.—The compensations mentioned in the foregoing Article shall consist of:

I. Three months' wages.

II. If the work relation should be for a specific period of time not exceeding one year: a sum equal to the wages payable for one-half the period that services were rendered. If exceeding one year: a sum equal to six months' wages for the first year and equivalent to twenty days' wages for each following year during which services were rendered.

If the work relation was for an indefinite period, the indemnity shall consist of twenty days' wages for each year's service.

III. The amount of the unearned wages for the period elapsing from the date of dismissal until the indemnities mentioned in the two foregoing Sections have been paid.

STATEMENT OF THE CASE

The petitioner, a resident of Florida, sued the respondent, the national airline of the Republic of Mexico, in the Circuit Court of Dade County, Florida and the cause was removed to the United States District Court, Southern District of Florida, on the basis of a diversity of citizenship between the parties. Petitioner sought benefits and indemnities under the Mexican Labor Code, claiming that he was terminated from respondent's employ without cause. Respondent denied this allegation and asserted that any claim petitioner might have had was barred by the lapsing provisions of the Mexican Labor Code.

The case was tried before the District Court without a jury, and upon the evidence presented, the trial court found for the petitioner, and in so doing determined that the petitioner's cause of action arose in the State of Florida; that the petitioner was terminated without justifiable cause; and that the petitioner was entitled to the benefits of the Mexican Labor Law. The trial court further found that the issue of limitations was procedural and not substantive, and that the Florida statute applied rather than the lapsing provisions of the Mexican Labor Law.

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the trial Court, holding the lapsing provisions of the Mexican Labor Law to be substantive and applicable to petitioner's claim. Consequently,

the appellate court ruled that petitioner's claim should have been denied.

This proceeding ensued.

ARGUMENT

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND NOT PROCEDURAL AND THEREFORE CONTROLLED BY THE MEXICAN, RATHER THAN FLORIDA LAW WHICH BARRED PETITIONER'S CLAIM?

No.

The appellate court properly held that the lapsing provisions of the Mexican Labor Law were substantive and constituted a bar to petitioner's claim.

In support of his argument under this point, petitioner relies entirely upon the Second Circuit case of *Wood & Selick*, supra. He erroneously contends that Florida would follow the test enunciated therein for determining whether the lapsing provisions of the Mexican Labor Law were substantive or procedural. Here again, petitioner overlooks the fact that the *Wood* test was later rejected by the Second Circuit in *Bournias*, supra., as follows:

> "And we do not think that it should matter whether . . . the foreign practice requires that limitation be placed, *Wood & Selick*, supra. 'The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discus-

> sions. It has all the tenacity of original sin and must constantly be guarded against.' Cook, Substance and Procedure in the Conflict of Laws, 42 Yale L.J. 333, 337 (1933). No more should it matter whether the foreign right is extinguished altogether by the mere passage of time, or is instead only repressed into a dormant state, subject to 'revival' if the defense of limitation is waived or renounced, *Wood & Selick*, supra. Such a distinction would generally be difficult to apply, and might also lead to results out of the pattern of the precedents; that is, if the defense could be waived under foreign law, a limitation period might be considered 'procedural' even though it was contained in a specific statute giving a remedy for wrongful death. Such limitations, however, are almost invariably held 'substantive.' Restatement of Conflict of Laws §397." 220 F.2d 156.

After rejecting all other tests, the Second Circuit in *Bournias* determined that the *specificity*[3] test should be applied:

> "Which, then, of these various tests should be applied here? It appears to us that it should be the one which *Davis v. Mills*, . . . suggests . . . ."
>
> * * *
>
> "We conclude, therefore, that the 'specificity' test is the proper one to be applied in a case of this type, without deciding, of course, whether the same test would also be controlling in cases involving domestic or other kinds of foreign statutes of limitations.
>
> Applying that test here it appears to us that the libelant is entitled to succeed, for the respondents

[3]Emphasis ours unless otherwise noted.

have failed to satisfy us that the Panamanian *period of limitation in question was specifically aimed against the particular rights* which the libelant seeks to enforce. The Panama Labor Code is a statute having broad objectives, viz.: 'The present Code regulates the relations between capital and labor, placing them on a basis of social justice, so that, without injuring any of the parties, there may be guaranteed for labor the necessary conditions for a normal life and to capital an equitable return for its investment.' In pursuance of these objectives the Code gives laborers various rights against their employers. *Article 623 establishes the period of limitation for* all *such rights, except certain ones which are enumerated in Article 621*. And there is nothing in the record to indicate that the Panamanian legislature gave special consideration to the impact of Article 623 upon the particular rights sought to be enforced here, as distinguished from the other rights to which that Article is also applicable. *Were we confronted with the question of whether the limitation period of Article 621 (which carves out particular rights to be governed by a shorter limitation period) is to be regarded as 'substantive' or 'procedural' under the rule of 'specificity' we might have a different case; but here on the surface of things we appear to be dealing with a 'broad,' and not a 'specific,' statute of limitations.*" 220 F.2d 156, 157.

This statement by the court in *Bournias* invites a discussion of two points, both of which are dispositive of this controversy.

First, the case at bar is the "different case" referred to in the cited case. Specifically, the relevant provisions of the

Mexican Labor Law, as contemplated by *Bournias*, prescribe different periods of limitation. The longer period of limitation ,which is the Mexican counterpart to Article 623 of the Panamanian Labor Code, is found in Article 328, as follows:

> "Article 328. *Rights to recourse which may arise from this Law* or from the collective or individual labor contract *shall lapse* in *one year, except in the cases covered by the following Articles.*"

Similarly, the shorter limitation period found in Article 621 of the Panamanian Labor Code is mirrored by Article 329 of the Mexican Labor Law *(which carves out particular rights to be governed by a shorter limitation period)*, as follows:

> "Article 329. The following shall lapse in *one month:*
>
> • • •
>
> III. Rights granted to workers by Section XXII of Article 123. . ."

Section XXII of Article 123 provides that:

> "XXII. An employer who dismisses a worker without justifiable cause . . . shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages . . ."

Thus, it plainly appears that in our case, we do have, as contemplated by the court in *Bournias*, a provision "which carves out particular rights to be governed by a shorter limitation period". And that, we submit, deems our lapsing provision substantive.

We pause here to point out that the decision in *Bournias* and the decisions of the Florida courts are in concord.

Florida follows the traditional rule that a statute of limitation is procedural for the purposes of choice of law and that the forum's statute of limitation generally applies to a cause of action arising under the laws of a foreign jurisdiction. However, Florida has long recognized the exception that when an entirely new right of action is created by statute, and the same statute provides the limitation of time within which the action must be brought, then:

> [s]uch a limitation of time is not like an ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to lapse without the institution of the action, such right of action becomes extinguished and is gone forever. *Fowler v. Matheny*, 184 So.2d 676, 677 (Fla. 4th Dist. 1966).

In *La Floridienne, J. Buttgenbach Co. v. Seaboard Air Line Ry.*, 52 So. 298 (1910) the Supreme Court of Florida quoted with approval from the case of *Stern v. La Compagnie Generale Transatlantique*, 110 Fed. 996, as follows:

> "In Stern v. La Compagine Generale Transatlantique (D.C.) 110 Fed. 996, it was held that, *where a statute gives a right of action for wrongful death, 'provided that every such action shall be commenced within 12 calendar months after the death of such deceased person,' such proviso was not merely a designation of the ordinary period of limitation for such actions,* operating as a part of the general statute of limitations of the state, on the remedy alone, and hence subject to extension under a provision of such general statute when the defendant was not a resident of the state, and having an action to enforce the right given when

> brought in another jurisdiction, to be governed by the law of the forum as to limitation, *but was an express condition of the right of action itself, which must be given effect in every forum wherein an action based upon the statute is instituted.* Thompson v. Hoxsie, 25 R.I. 377, 55 Atl. 930; *The Harrisburg,* 119 U.S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; 19 Am. & Eng. Ency. Law, p. 151."

Similarly, in *Bowery v. Babbit,* 128 So. 801 (1930), the Supreme Court of Florida said:

> "In handing down the opinions which we have just referred to, this Court doubtless had in mind that line of decisions which holds that where a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and that the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided. Cases cited . . . In other words, when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right. *The Harrisburg,* supra; *Davis v. Mills,* 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067."

In *The Harrisburg,* 119 U. S. 199 (1886), a libel in admiralty for wrongful death where the limitation set forth in the appropriate state statute had run and there was no recognized federal right of action for wrongful death, the Supreme Court reversed a finding for the plaintiff and ordered that suit dismissed.[4] In so doing, the Court

[4]In *Moragne v. States Marine Lines.* 398 U. S. 375 (1970), *The Harrisburg* was overruled insofar as it held that there was no cause of action in admiralty for wrongful death due to negligence. The vitality of that portion of the holding cited here, however, continues unabated.

held at p. 215 that:

> The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.

Some years later the Court faced a similar issue when they were asked to apply the *Harrisburg* rule to a limitation which was enacted subsequent to the enactment of the statute creating the right to which the limitation purportedly attached. In *Davis v. Mills*, 194 U. S. 451 (1904), the Court, in applying the Harrisburg rule to the limitation, enunciated the test of *specificity*, as follows:

> "The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so *specifically* as to warrant saying that it qualified the right."

The Court speaking through Justice Holmes then held that:

> The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident. If the laws of Montana [the state whose statute was in issue] can set the limitation to the domestic suit, it is the least possible stretch to say that they may set it also to a foreign action, even if to that extent an existing right is cut down. 194 U.S. 457.

Accord: Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970); *Gaston v. B. F. Walker, Inc.*, 400 F.2d 617 (5th Cir. 1968); *Kenney v. Trinidad Corp.*, 349 F.2d 832 (5th

Cir. 1965); *Kozan v. Comstock*, 270 F.2d 839 (5th Cir. 1959); *Ford, Bacon & Davis v. Volentine*, 64 F.2d 800 (5th Cir. 1933).

Florida's adherence to the *specificity* test fashioned by the Court and followed by the Fifth Circuit and Second Circuit is dispositive of this controversy.

Recalling that under that test the limitation period is deemed substantive if it is *specifically* directed to the liability so as to warrant saying that it qualifies the right, Petitioner has made what must be regarded as a concession fatal to his position herein:

> ". . . the lapsing provisions contained in Article 329, sub-section (III), *specifically* limit the rights of the worker contained in Article 123 of the 1931 Act . . ."[5]

Consistent with the record and petitioner's own view of it, the appellate court found that:

> "The employee's right is created by the Law, the period of limitations is contained in the Law, and the lapsing period is specifically made applicable to employees in Gillies' situation."

Thereupon, the appellate court correctly concluded that:

> "The Mexican limitation period should have been applied. Under it Gillies' claim had lapsed. The district court should have denied recovery."

SECOND QUESTION

DID THE APPEALS COURT ERR IN REVERSING THE DISTRICT COURT BY

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[5]Page 31 of petitioner's brief filed in the appellate court.

DETERMINING THAT THE ENFORCEMENT OF PETITIONER'S EMPLOYMENT CONTRACT RIGHTS WAS SUBSTANTIVE AND CONTROLLED BY MEXICAN LAW WHICH CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA?

No.

The appellate court correctly held that the lapsing provisions of the Mexican Labor Law were substantive and, consequently, applicable to petitioner's claim for benefits thereunder.

Undaunted by the evident correctness of that holding, petitioner nevertheless says that the ruling contravenes the public policy of Florida as expressed by Florida Statute 95.03:

> "All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Petitioner's argument is bad for several reasons. First, the statute just quoted, by its very terms, is applicable to a *contract*.[6] It is not, by any strained interpretation thereof, applicable to a substantive statute of limitation contained in a controlling foreign law.

Petitioner virtually concedes this by his purposeful transformation of what was, at the time of its commence-

ment, simply a claim for benefits under the Mexican Labor Law to an action predicated upon an alleged breach of an employment contract. This effort provides, at most, an illusory nexus between the statute petitioner seeks to invoke and the nature of the action declared upon. No real connection between petitioner's claim on the one hand and the statute which is expressly applicable to a *contract* on the other, is present. And, in a more candid moment, petitioner confessed that:

> "Without the *Mexican Federal Labor Law* the Plaintiff admittedly would have no cause of action. It is *this law* and the beneficial provisions thereof which apply to this plaintiff and *that* creates his cause of action.[7]

Manifestly, the statute relied upon by petitioner is not applicable to the substantive lapsing provisions of the controlling Mexican Labor Law and, consequently, petitioner's public policy argument must fail.

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[6]It should be recalled that there was no written contract between the parties, much less any agreement between them which fixed any period of time within which a suit thereunder could be instituted. The lapsing provision here involved is not a matter of contract but, rather, is the substantive feature of a controlling foreign law.

[7]Page 40 of petitioner's brief filed in the appellate court.

CONCLUSION

It is respectfully submitted that certiorari jurisdiction does not exist and that, therefore, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted

Phillip G. Newcomm

Of Counsel:
SHUTTS & BOWEN
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the within Brief of Respondent in Opposition to Petition for Writ of Certiorari was mailed this_____day of January 1973, to Prunty, Ross & Olsen, Attorneys for Petitioner, 837 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

_____

Phillip G. Newcomm